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No. 87-1132

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4118, AND THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4117,

Petitioners,

v.

SANTA BARBARA FOUNDATION,

Respondent.

On Petition for Writ of Certiorari to the Ohio Supreme Court

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION

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MOTION FOR LEAVE TO FILE A BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION

In accordance with the provisions of Rule 36 of the Supreme Court Rules, the American Bankers Association hereby respectfully moves the Court for leave to file the attached brief as amicus curiae in support of the petition. The Petitioners have consented to the filing of this brief; the Respondent has not replied to a request for its consent.

The American Bankers Association is the principal national trade association of the commercial banking industry in the United States. There are member banks of the American Bankers Association in each of the fifty states and the District of Columbia, approximately four thousand of which have and exercise trust powers. As more fully shown in the attached Brief as Amicus Curiae, it is entirely customary for bank trustees to administer trusts where a significant percentage of the income beneficiaries are located outside the state in which the bank does business. It is exceptionally impractical and uneconomical for trustees to carry out their fiduciary duties to trusts, settlors and beneficiaries if the trustees can be haled into court anywhere in the country or, for that matter, in the world, in litigation over the disposition of trust assets. Accordingly, it is of critical importance to the industry that the due process rights of trustees be protected against judgments which exceed the scope of local courts' jurisdiction. The fact that this Court has recognized this fundamental principal time and again has provided no relief thus far in this case. The American Bankers Association, as the representative of the industry most affected by the outcome of this litigation, therefore respectfully urges the Court to receive the attached brief as amicus

curiae for a presentation of the views of the banking industry on this matter.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether petitioners, who are, respectively, an Ohio beneficiary claimant of trust property, and the Ohio trustee holding and administering such property, were denied due process of law by a judgment of the Ohio Supreme Court giving preclusive effect, as a matter of full faith and credit, to an order of a California court awarding the property and directing its distribution to another claimant, in a proceeding in which petitioners did not appear, and in which jurisdiction over them was asserted by mere notice of such proceeding?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION

The American Bankers Association respectfully submits this brief as amicus curiae to urge the Court to grant the petition for writ of certiorari in order to review a decision of the Ohio Supreme Court. In that decision, the court gave "full faith and credit" to a decision of a California probate court which purported to bind an out-of-state trust and trustee, and to fix certain property rights even though the California court lacked jurisdiction over the trust and trustee. In doing so, the Ohio Supreme Court placed itself at

odds with controlling precedent laid down by this Court, and has denied due process of law to the trust and trustees.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the principal national trade association of the commercial banking industry in the United States. Its members are located in each of the fifty states and the District of Columbia and include banks chartered by the United States ("national banks") and those chartered by their respective states ("state banks"). Approximately 4,000 commercial banks in the United States possess and exercise trust powers under applicable federal and state law.

Perhaps more than most industries, banking in the United States is a local business. Historically, various state and federal laws have seriously constrained the ability of banks to open business locations other than their main offices. In many states, so-called "unit banking" states, there has been a flat prohibition against any branch offices of banks. Other states permit limited or statewide branching of banks. National banks are bound by state branching laws by virtue of the McFadden Act (12 U.S.C. § 36) and, in point of fact, until that law was enacted in 1927, national banks were not authorized to have branch offices at all. *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924).

It is only in this decade, two centuries after the founding of the nation, that banking organizations are beginning to transcend state borders in any meaningful fashion, through state legislation which permits bank holding companies from other states to operate

within the legislating state under certain conditions (*See Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985)) or through the opening of out-of-state offices dedicated to the performance of limited functions, rather than the full panoply of banking services (*See Clarke v. Securities Industry Association*, 107 S. Ct. 750 (1987)).

While these developments are well-publicized and involve some of the major banking organizations in the country, the fact remains that the overwhelming majority of banks have not expanded their geographic presence beyond traditional limits.

But if banks are essentially immobile, the customers they serve are not. This case is a good example of the point. In 1960, Nancy Jones, of Ohio, went to her local bank, Toledo Trust, to create two inter vivos trusts in favor of her daughters. Toldeo Trust remained in Ohio, but Nancy Jones and her daughter did not. Mrs. Jones now maintains residences in Nevada and California, and her daughter, Marcia Rivas, died a resident of California. Toledo Trust did not intentionally seek out the business of Californians in this case, but unwittingly found itself doing business with Californians anyway. Member banks of the American Bankers Association have reported to us informally that anywhere from ten percent to fifty percent of the income beneficiaries of trusts which they administer are located outside of the state in which the reporting bank does business.

In this case, the trust in favor of Marcia Rivas gave her the power to appoint, by will, successor recipients of the assets of the trust upon her death. In default of a testamentary appointment, the proceeds of the

Rivas trust were to be paid to the trust simultaneously established in favor of Mrs. Jones' other daughter, Roberta Pawlak. Mrs. Rivas attempted to exercise her power of appointment to designate Alcoholics Anonymous as recipient of ten percent of the assets of the trust. Alcoholics Anonymous declined to accept more than $500.

The Santa Barbara Foundation then laid claim to the assets, invoking the cy pres doctrine, and after a hearing, the probate court in Santa Barbara awarded the assets to the Foundation. It is at least arguable that Mrs. Rivas' unsuccessful attempt to bestow assets upon Alcoholics Anonymous constituted a default in the exercise of her power of appointment, in which event the Pawlak trust would have been the recipient of the ineffectively appointed assets. The Court of Common Pleas of Lucas County, Ohio, and the Ohio Court of Appeals so held. But whether those courts were correct or not is not the point. The critical point here is that the Santa Barbara probate court extinguished any claim, any property right, the Pawlak trust might have had to the Rivas trust assets without ever having established jurisdiction over the trusts or the trustee and without ever having had the cy pres claim of the Foundation undergo an adversarial proceeding. To this patently unjust disposition, the Ohio Supreme Court gave full faith and credit. If the decision stands, and becomes precedent elsewhere, it will sanction similar outcomes in the future, and will compel bank trustees, doing business in discrete locations to stand ready to represent their trusts in far-flung, unfamiliar and unanticipated jurisdictions. That is impractical and uneconomical both from the point of view of the bank and the settlors and

beneficiaries of trusts. Moreover it is a denial of due process of law to trusts and trustees outside the jurisdiction of the courts claiming the ability to render dispositive judgments.

SUMMARY OF THE ARGUMENT

This is a case in which the Ohio Supreme Court has decided an important question of federal constitutional law in a way in conflict with applicable decisions of this Court, both with respect to its determination of the personal jurisdiction issue and with respect to the issue of jurisdiction over the trust assets. Mere "notice" that certain proceedings are under way in an out-of-state forum is constitutionally insufficient to establish jurisdiction over the trustee. In addition, the necessary, but unstated, assumption that the trust assets were assets of the estate, subject to jurisdiction of California probate courts, is an erroneous one.

ARGUMENT

I. PERSONAL JURISDICTION OVER THE TRUSTEE

There is no question in this case that the trustee, Toledo Trust Co., received a notice that the Santa Barbara Foundation had filed a "Petition for Determination of Entitlement to Distribution of the Estate" in the California courts, and that a hearing would be held on the matter. The notice stated that "[t]his notice is required by law. This notice does not require you to appear in court but you may attend the hearing if you wish." (A86-87)

The Constitution requires more in order for a court to bring a party within its jurisdiction. Such a "no-

tice" without more, "is a futile attempt to extend the authority and control of a State beyond its own territory." *Baker v. Baker, Eccles & Company*, 242 U.S. 394, 403 (1917).

Indeed, as this Court has held, just this term,

> before a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.

Omni Capital International v. Rudolph Wolff and Co., Ltd., 56 U.S.L.W. 4031, 4033 (U.S. Dec. 8, 1987).

In this case, of course, there was no summons, no consent, and no constitutionally sufficient relationship between the trustee and the State of California. As a nonresident, Toledo Trust becomes subject to jurisdiction of California courts if, and only if, it has "certain minimum contracts with [California] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted).

> The concept of minimum contacts, in turn can be seen to perform two related, but distinguishable functions. It protects the defendant against the burdens of litigating in an inconvenient forum. And it acts to ensure that states do not reach out beyond limits in a federal system, *World-*

Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-292 (1980).

Volumes could be written on what does and does not rise to the level of "minimum contacts," but we need not detail those considerations here. Toledo Trust has no contacts with California, none are apparent in the records of this case, and none are alleged. It is only the presence in California of the estate of a deceased income beneficiary of the trust which gives even a colorable claim to jurisdiction by California courts.

Yet in *Hanson v. Denckla*, 357 U.S. 235 (1958), this Court made it perfectly clear that a trust and trustee located in one state were not subject to jurisdiction in another state simply because a will was probated in the second state, and that will purported to claim the trust assets as an asset of the estate. The facts in this case are virtually identical and the result should be the same.

II. JURISDICTION OVER THE TRUST ASSETS

Hanson disallowed assertion of jurisdiction over out-of-state trust assets. In the case of Marcia Rivas, what was at issue was a decedent's *estate*'s assets, which were properly subject to jurisdiction of a probate court in the decedent's domicile at the time of death: "The decision of the California court merely sought to ascertain and give effect to the *testamentary* intent of a California domiciliary, *Toledo Trust v. Santa Barbara Foundation*, 32 Ohio St. 3d. 141, 146, 512 N.E.2d 664, 668 (1987) (emphasis supplied).

This is the fatal flaw in the reasoning of the Ohio Supreme Court, for in point of fact, the *testamentary* intent of Marcia Rivas is not relevant to anything.

The trust assets, legally owned by Toledo Trust and located in Ohio, did not pass to the various designated charitable organizations under and by virtue of Rivas' will *as such*. Rather, the assets passed in accordance with the terms *of the trust*. Rivas' will was merely the prescribed medium for the exercise of a power of appointment. The trust could just as easily have directed that the power of appointment be exercised by writing in longhand on the back of an envelope. Mrs. Rivas could not very well have bequeathed that which she did not own, and she never *owned* the trust's *assets*. Those were assigned, transferred, conveyed and delivered to the Toledo Trust Company and held by the Toledo Trust Company. Mrs. Rivas was the beneficiary of "such part of the income and/or principal as [Toledo Trust in *its* discretion] deems necessary, advisable or expedient" to pay to her from time to time (Trust Agreement, Article II, Section 1).

The Trust Agreement goes on to provide explicitly that Mrs. Rivas had the power of appointment to dispose of the trust assets at the time of her death, but that "such power of appointment shall not be exercisable in favor of the Donor's (Ms. Jones) said daughter (Mrs. Rivas), *her estate*, her creditors or the creditors of her estate." (Trust Agreement, Article II, Section 2) (emphasis supplied).

By its very terms, therefore, the Trust Agreement prevents the *assets* of the trust from becoming part of the Rivas *estate*, and therefore those *assets* cannot become subject to probate. But it is only the assets of the *estate* which are within the jurisdiction of the California courts. It is the trust agreement, and the intent of the Donor of the trust (Ms. Jones) which dictate the disposition of the trust assets, not the Last

Will and Testament of Marcia Rivas or the intent of the Testatrix.

This case is not any different from *Hanson v. Denckla* where, like here, there was an attempt to exercise a *testamentary* power of appointment in one state governing the assets of a trust in another state. The court of the state in which the testamentary disposition was attempted was held, by this Court, to lack jurisdiction:

> The Florida court held that the presence of the subject property was not essential to its jurisdiction. Authority over the probate and construction of its domiciliary's will, under which the assets might pass, was thought sufficient to confer the requisite jurisdiction. But jurisdiction cannot be predicated upon the contingent role of this Florida will. Whatever the efficacy of a so-called "in rem" jurisdiction over assets admittedly passing under a local will, a State acquires no in rem jurisdiction to adjudicate the validity of the inter vivos dispositions simply because its decision might augment an estate passing under a will probated in its courts. If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which neither the state nor the decedent could claim any affiliation. The settlor-decedent's Florida domicile is equally unavailing as a basis for jurisdiction over the trust assets. . . . In analogous cases, this Court has rejected the suggestion that the probate decree of the State where a decedent was domiciled has an in rem effect on personalty outside the forum state that could render it conclusive on the in-

> terests of non-residents over whom there was no personal jurisdiction. (citations omitted). The fact that the owner is or was domiciled within the forum state is not a sufficient affiliation with the property upon which to base jurisdiction in rem.

(*Id.*, 357 U.S. at 247-249).

The Ohio Supreme Court's efforts to distinguish *Hanson v. Denckla* must therefore fail.

CONCLUSION

For all of the reasons stated herein, the amicus curiae American Bankers Association respectfully urges that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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